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Nos. 71 and 73

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

FEDERAL POWER COMMISSION, *Petitioner,* vs. SOUTHERN CALIFORNIA EDISON COMPANY and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 71
CITY OF COLTON, CALIFORNIA, *Petitioner,* vs. SOUTHERN CALIFORNIA EDISON COMPANY and PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *Respondents.*	No. 73

On Writs of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR SOUTHERN CALIFORNIA EDISON COMPANY

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit (R. 938-954) is reported at 310 F.2d 784. The opinion and orders of the Federal Power Commission (R. 839-869, 892-897) are reported at 26 F.P.C. 223 and 492.

JURISDICTION

The decree of the Court of Appeals for the Ninth Circuit was entered on November 16, 1962 (R. 955). This Court issued orders allowing certiorari on April 1, 1963, consolidating the proceeding brought by the Federal Power Comission, Docket No. 71 (formerly Docket No. 808, October Term, 1962) with the proceeding brought by City of Colton, California, Docket No. 73. (formerly Docket No. 822, October Term, 1962).

The jurisdiction of this Court rests upon 28 U.S.C. 1254 (1) and Section 313 (b) of the Federal Power Act, 16 U.S.C. 825 *l* (b).

QUESTIONS PRESENTED

(1) Whether the Federal Power Commission may extend federal regulation to the rates charged by Southern California Edison Company for sales of electric energy to the City of Colton, California; (a) where the only possible source of out-of-state energy in such sales was energy from a Colorado River hydroelectric project of the United States purchased by Edison at rates fixed by the United States pursuant to Boulder Canyon Project legislation; (b) where the sale of such out-of-state energy, if any, by Edison to Colton for resale and use within Colton was of concern only to, and was constitutionally regulated by, the State of California; and (c) where Congress has expressly stated that federal jurisdiction is "to extend only to those matters which are not subject to regulation by the States", Federal Power Act, Section 201 (a), 16 U.S.C. 824 (a).

(2) Whether the Federal Power Commission may regulate the rates charged by Edison to Colton, where such regulation would encroach upon subject matter specifically left to regulation by the States under the Boulder Canyon Project Act, 43 U.S.C. 617.

These are the questions raised by petitioners, and they are the questions with which Edison deals in this brief. The Court of Appeals for the Ninth Circuit considered only the first of them, finding it unnecessary to pass on the second and also finding it unnecessary to consider either of the following additional questions which had been raised before that Court:

(3) Whether the Federal Power Commission's finding that some out-of-state Colorado River hydroelectric energy was delivered by Edison to Colton is supported by substantial evidence in the record.

(4) Whether federal jurisdiction over the sale of electric energy by Edison to Colton is prevented by the "local distribution" proviso of Section 201 (b) of the Federal Power Act, 16 U.S.C. 824 (b).

A finding adverse to FPC and Colton on any one of the questions numbered (1) through (4) is sufficient in itself to sustain the judgment of the Ninth Circuit.

Additional questions, though not finally determinative of regulatory jurisdiction, were raised below but did not have to be decided by the Court of Appeals. They would remain to be considered only if the judgment below were to be set aside.

STATUTES INVOLVED

The pertinent provisions of the Federal Power Act, the Natural Gas Act, the Boulder Canyon Project Act, and the Act of May 28, 1954, 68 Stat. 43, are set forth in the Appendix.

STATEMENT

This case involves the competing claims of the Public Utilities Commission of the State of California (PUC) and the Federal Power Commission (FPC) to regulate the rates for a sale of electric energy by Southern California Edison Company (Edison) to the City of Colton, California (Colton). Colton has no generating facilities and has always purchased all of its electric requirements from Edison. Edison's sales to Colton have been regulated by the PUC since the PUC's creation in 1911. FPC claims the right to extend its jurisdiction to these sales and oust the California Commission.

Colton initiated this proceeding before the FPC in the hope of invalidating certain PUC rates found to be reasonable and of recovering money collected thereunder. FPC found in favor of its own jurisdiction and entered its Order Determining Jurisdiction (R. 837-869).[1]

The Court of Appeals, reversing the FPC, found that Edison is engaged in serving only customers in California,

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[1] Edison made the filings required by the order under review and billed Colton at both the FPC and PUC rates. Colton elected to pay the FPC rate which was the lower. However, after an increased rate filed by Edison with FPC had become effective (assuming FPC jurisdiction) on June 1, 1962, subject to refund, Colton has paid only the bill based upon the PUC rate which is now the lower.

and that all of its sources of electric energy are located in California except for the small portion received from Hoover under contract with the United States. The rate which Edison pays for such Hoover power is under the control of the United States and is fixed by Edison's contract with the United States. Because of this fact, and the additional fact that Edison does not sell any energy outside California, the court below found that no state other than California could be affected in any way by the regulation of the rates charged by Edison in the subsequent sale to Colton, even if it were assumed that some Hoover energy reached Colton. Therefore, the Federal Power Act by its own terms precluded FPC jurisdiction.

SUMMARY OF ARGUMENT

I. The Federal Power Act, Part II, Withholds Rate Jurisdiction From FPC in a Case Like This Where the Wholesale Sales Cannot Affect the Interests of More Than One State.

The Ninth Circuit correctly held that, even if electric energy from a Colorado River hydroelectric project outside California be considered to have reached Colton in Edison's sales to Colton, making them interstate commerce sales, no jurisdiction could properly be claimed by FPC under its power to regulate interstate wholesale sales because the Federal Power Act, Part II, Section 201(a) expressly limits such FPC jurisdiction "to those matters which are not subject to regulation by the States". The Edison-Colton sales *are* the kind of wholesale sales which, even if in interstate commerce, are "subject to regulation by the States." This is so because they involve

the interests of California only. They are sales which are preceded by federally regulated sales by the United States to Edison; moreover, the energy purchased by Colton is consumed wholly within California, as is all energy sold by Edison. Therefore, the Edison-Colton sales are constitutionally within the power of California to regulate. *Public Utilities Commission v. Attleboro Steam & Electric Co.*, 273 U.S. 83 (1927).

The *Attleboro* case held that the dividing line for defining state jurisdiction over interstate electric sales is to be determined, as in other areas of interstate commerce, by considering whether a multi-state concern is involved or whether on the contrary the interests of only one state are affected. If the latter situation exists under a particular set of facts, there is no "direct" burden upon interstate commerce and the state can constitutionally regulate in the absence of federal regulation occupying the field.

A sale which affects the interests of the producing state as well as any other states supplied from the same source cannot constitutionally be regulated by any one of those states. However, if that preceding sale is brought under federal regulatory power, any subsequent "downstream" sales of the same energy in the state of ultimate consumption, whether wholesale or retail, are of no concern to any other state, and such sales can constitutionally be regulated by the state of ultimate consumption.

While Congress intended to give the FPC jurisdiction over interstate electric energy sales falling within the constitutional gap revealed in the *Attleboro* decision, Congress also was meticulous in its intention to give the FPC

no more. Thus Congress not only used Section 201(a) to limit FPC jurisdiction, but, under persuasion of the National Association of Railroad and Utilities Commissioners, added a clause of limitation in each section of Part II giving a specific grant of authority to FPC. For those provisions specifically granting *rate* jurisdiction the additional clause, "subject to the jurisdiction of the Commission", was inserted to require reference back to the language of Section 201(a), which limits FPC jurisdiction "to those matters which are not subject to regulation by the States".

The legislative history leaves no doubt that Congress intended the Federal Power Act to be read as stated above. Thus in Senate Report No. 621, 74th Cong., 1st Sess. 18 (1935), we find at page 48:

> "Subsection (a) . . . declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission.
>
> • • •
>
> "The revision has also removed every encroachment upon the authority of the States. The revised Bill would impose federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of federal authority over State matters.
>
> • • •
>
> "The rate-making powers of the Commission are confined to *those* wholesale transactions which the Supreme Court held in the Public Utilities Commis-

sion v. Attleboro Steam and Electric Co. (273 U.S. 83) to be beyond reach of the States". (Emphasis added.)

There is no inconsistency between Section 201(a) and the following Section 201(b) which states that the Act shall apply "to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy . . .". The two subsections must be read in harmony if the intent of Congress is to be given effect and if the tenet of statutory construction is to be observed that parts of a statute are to be read in harmony wherever possible. "[*T*]*he* sale of electric energy at wholesale . . ." in Section 201(b) does not have to be read to mean "*every* sale of electric energy at wholesale . . ."; rather, to harmonize it should be read to relate only to *the* sales at wholesale to which FPC jurisdiction is limited by the preceding Section 201(a).

FPC in attempting to discount the impact of the *Attleboro* decision contends in the alternative: (a) that *Attleboro* holds that the constitutional limitation of state jurisdiction is determined by an arbitrary cleavage between wholesale and retail, (b) that in the alternative Congress so construed *Attleboro,* even though it be a misconstruction, (c) that in the alternative Congress decided to abandon *Attleboro* and create its own dividing line between constitutional and non-constitutional exercise of state jurisdiction.

Each of the three alternatives resorted to by FPC is contrary to the fact: (a) This Court clearly stated in *Attleboro* that the decision turned on a consideration of national versus local interest in that particular trans-

action. The Court did not state that a mechanical cleavage between wholesale and retail should be the test. (b) The statutory history unmistakably reveals that Congress was not misinformed and did not misconstrue *Attleboro* at the time Part II was being considered for enactment. To demonstrate that Congress was fully informed, the Ninth Circuit aptly quoted from the remarks of Senator Wheeler who guided Part II of the Federal Power Act through Congress: R. 947, 79 Cong. Rec. 8436, 8437 (1935). (c) The statutory history is unmistakable that Congress, far from deciding to abandon *Attleboro*, was strongly motivated by an obverse and converse of the same intent, viz., to fill with FPC jurisdiction the constitutional gap in state regulation revealed by *Attleboro*, but to preclude FPC from having any jurisdiction outside that gap.

Next FPC contends, however, that, the *language* of the Federal Power Act compels a mechanical cleavage test of wholesale versus retail to determine the limits of state constitutional power. To arrive at this result FPC is forced to *begin* by construing Sections 201(a) and 201(b) so that they will be inconsistent, and also to *begin* by construing Section 201(b) as a specific grant to FPC of jurisdiction over *every* wholesale sale in interstate commerce, thus assuming the very answer whose propriety FPC is trying to demonstrate. Having set up these arbitrary propositions, FPC then argues, that, of the two "inconsistent" provisions, Section 201(a) must yield because it is a "preamble" not worthy of consideration in the face of a "specific grant" which FPC finds in Section 201(b). But Section 201(b) is not a specific grant of jurisdiction over rates for interstate electric sales. Such a specific grant is found rather in Sections 205 and 206.

Furthermore Sections 201(a) and 201(b) *do not* have to be read inconsistently, and should not be. Finally, the statutory history shows that Section 201(a) was not intended by Congress to collapse in the face of specific grants in other sections such as Sections 205 and 206. On the contrary, each of those sections includes limiting language which requires reference back to Section 201(a). FPC by such limiting language is precluded from encroaching upon the regulatory authority over interstate wholesale sales which the states could constitutionally exercise prior to the enactment of Part II.

The FPC next asserts, that regardless of the construction of *Attleboro*, and regardless of the meaning of the words used by Congress in the statute, decisions of this Court support FPC jurisdiction. A review of such cases reveals that *no* case decided by this Court related to the kind of sales here in issue, where a utility operating in a single state purchases its only out-of-state source at rates fixed by the federal government and thereafter sells energy solely for local distribution and consumption so that the interests of only one state could be affected. The one decision which upon its facts lends support to the position of FPC is a Court of Appeals case[2] which, we submit, was incorrectly decided on the authority of an earlier case mistakenly said to have strikingly similar facts.[3]

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[2] *Wisconsin v. Federal Power Commission*, 201 F.2d 183 (CADC 1952), affirming *Interstate Light and Power Co.*, 10 FPC 225 (1951), *cert. den.* 345 U.S. 934.

[3] *Wisconsin-Michigan Power Co. v. Federal Power Commission*, 197 F.2d 472 (1952), *cert. den.* 345 U.S. 934. The striking dissimilarity is revealed by examining the FPC decision in *Interstate Light and Power, supra*, footnote 2.

FPC next argues that the Edison-Colton sales are of concern to more than one state because of an alleged effect upon allotments of Colorado River energy. The record demonstrates that the allotments of Colorado River energy have no relationship whatever to the rates charged by Edison to Colton. The Ninth Circuit in correctly deciding that the Edison-Colton sales are the kind of wholesale sales which, even if interstate energy were considered to be involved, could not possibly be the concern of any state other than California, said (R. 951):

> "In the case at bar . . . [unlike *Attleboro*] the sale from which the interstate transmission springs is already, under federal control through federal sale of the power to the Metropolitan Water District and direct federal participation in the resale to Edison. Any conceivable conflict of interest among Arizona, Nevada and California with respect to the operation of Colorado River plants and the allocation of energy from them is thus totally subject to federal regulation through the United States' position as lessor of the generators at Hoover, Parker and Davis. The only other possibility of multi-state concern with the Edison-Colton sale would seem to rest upon Nevada's desire to protect Edison's customers in that State through securing for them the benefit which a profitable rate to Colton would permit. This possibility is nullified by the fact that Edison's sales are all within California. Nevada has no resident customers to protect. . . .
>
> . . . .
>
> "The lack, in this case, of any interstate conflict of interest not already subject to federal regulation is, we feel, decisive."

FPC next contends that this Court should strain to construe the Federal Power Act to give it jurisdiction over the Edison-Colton sales because otherwise the FPC will be frustrated in its jurisdiction over interstate power pools. But FPC's jurisdiction over interstate power pools is in no wise impaired or diminished by California's exercise of jurisdiction over the Edison-Colton sales. The FPC now has power under Section 208(a) to determine all facts necessary to fix the rates for interstate power pools. Furthermore, FPC's limited jurisdiction under Section 202(b) to order interconnections is in no way hampered or affected by its absence of jurisdiction over Edison's sales to Colton.

FPC, preoccupied with the concept that federal regulation is good *per se*, utterly ignores the unique competence of the California Commission to deal with the purely local considerations bearing upon the rates for Colton. FPC makes no mention of the monumental confusion, without a shred of public benefit, which would ensue if its assertion of jurisdiction were maintained. A great multitude of wholesale sales of purely local concern throughout the United States would suddenly become subject to FPC jurisdiction if its position here were allowed to prevail.

II. The Boulder Canyon Project Legislation Withholds Rate Jurisdiction From FPC Where Colorado River Hydroelectric Energy Is Involved. This Is True Both for the Initial Sale by the United States and for Subsequent Sales by the Purchaser.

If it be assumed for argument that some out-of-state energy from Colorado River hydroelectric plants was proven to reach Colton as a result of Edison's sales to that city, the Boulder Canyon Project legislation applies. That legislation places regulation of the rates for sale by the United States in the Secretary of the Interior, and regulation of the rates for resale by the purchaser (Edison) not in FPC but in the state commission, where the resale and consumption occur, or in the absence of such a commission, with the Secretary of the Interior.

All of the Boulder Canyon legislation was enacted subsequent to the *Attleboro* decision of 1927. When the Boulder Canyon legislation was first considered, FPC urged Congress that FPC, rather than the Secretary, be granted the rate authority in question. It was refused. H.R. Rep. No. 1657, 69th Cong., 2d Sess. (1926).

The Boulder Canyon Project Act (45 Stat. 1057) enacted in 1928 provides, in Section 6:

> ". . . *The Secretary of the Interior* shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting . . . maintenance of a system of accounting, control of rates and service *in the absence of State regulation* or interstate agreement. . . . He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commis-

sion, which have been devised *or which may be hereafter devised*, for the protection of the investor and consumer. . . ." 43 U.S.C. 617e. (Emphasis added.)

The subsequent enactment of Part II of the Federal Power Act in 1935 did not affect such grant because the Boulder Canyon Project Act specifically anticipated such a later enactment by directing that the Secretary of the Interior should exercise his authority in conformance with those provisions of law later enacted. Part II of the Federal Power Act did not impliedly repeal, but affirmatively expanded, the authority of the Secretary of the Interior precisely as anticipated by the Boulder Canyon Project Act.

Since 1935, Congress has had several opportunities to amend or modify this method of regulation for Colorado River energy. The Boulder Canyon Project Adjustment Act of 1940 (54 Stat. 774) amended portions of Section 6, *leaving intact* that portion authorizing regulation of rates charged by purchasers of Hoover energy. Both the Project Act and the Adjustment Act were subsequently reaffirmed by Congress when it authorized the consolidation of the operation of the Hoover, Davis and Parker Projects in 1954. (68 Stat. 43.)

The regulation of rates charged by Edison for the sale in California of energy purchased under the Hoover contracts was fully considered by Congress. The authority which FPC now claims was expressly refused and was instead vested in the Secretary of the Interior, to be exercised, however, only in the absence of state regulation.

ARGUMENT

I. THE FEDERAL POWER ACT, PART II, DOES NOT GIVE THE FPC JURISDICTION OVER EDISON'S SALES TO COLTON. THE NINTH CIRCUIT CORRECTLY DECIDED THIS ISSUE.

The Federal Power Act, Part II, does not give the Federal Power Commission jurisdiction over sales of electric energy for resale unless such sales are "in interstate commerce". Even as to such sales for resale FPC jurisdiction is not all-comprehensive, as the Act specifically limits FPC authority to those matters which are not subject to regulation by the states. Sections 201 (a) and 201 (b).

To establish a claim of interstate commerce the FPC staff tried to prove that some part of the energy sold by Edison to Colton came from out-of-state. While Edison is firmly of the view that the FPC was wholly unsuccessful in its attempt to trace interstate energy to Colton, Edison will, but solely for purposes of argument in this section of the brief, assume that some out-of-state energy did reach Colton.[4]

The Ninth Circuit correctly concluded that even with out-of-state energy considered to reach Colton, the FPC could not lawfully assert jurisdiction because the wholesale sales in question would come within Congress's avowed intent to leave to the states the jurisdiction over those sales which the states, prior to the enactment of Part II in 1935, could constitutionally regulate.

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[4]Both the presiding examiner, who heard the evidence, and the Ninth Circuit, which reviewed the FPC decision, found it unnecessary to decide this issue because each found that FPC jurisdiction failed for an independent reason.

A. The Clear Purpose and Design of Congress in Enacting Part II of the Federal Power Act Was to Fill the Attleboro Gap With FPC Jurisdiction, Leaving to the States All Jurisdiction Over Interstate Sales (Wholesale or Retail) Which the States Could Constitutionally Exercise in the Absence of Federal Statute.

1. The Attleboro Gap.

Public Utilities Commission v. Attleboro Steam and Electric Co., 273 U.S. 83 (1927) concerned the attempt of the Rhode Island Commission to regulate the rates at which a Rhode Island producing company sold power at the Rhode Island border to a Massachusetts distributing company for resale in Massachusetts. The Court recognized that, although both Rhode Island and Massachusetts had an interest in the rate charged, their interests were essentially in conflict. In this situation the Court held that neither Rhode Island nor Massachusetts could regulate the rate in question without violating the Commerce Clause because such state regulation would impose a "direct" burden on interstate commerce.

The crucial fact upon which the Supreme Court reached its conclusion of "direct" burden was that under the particular circumstances, if either Rhode Island or Massachusetts were permitted to do so, the price at which the interstate sale was to be made could be set so as to benefit the local consumers in one state to the detriment of consumers in the other. As the Court pointed out:

> "Furthermore, if Rhode Island could place a direct burden upon the interstate business of the Narragansett Company because this would result in an indirect benefit to the customers of the Narragansett Company in Rhode Island, Massachusetts could, by parity of

reasoning, reduce the rates on such interstate business in order to benefit the customers of the Attleboro Company in that State, who would have, in the aggregate, an interest in the interstate rate correlative to that of the customers of the Narragansett Company in Rhode Island. Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate is therefore not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required, it can only be attained by the exercise of the power vested in Congress." 273 U.S. at 90.

While *Attleboro* involved a wholesale sale, the rationale of that case is not that every interstate wholesale sale is of necessity beyond the constitutional power of states to regulate, but rather that only where such interstate wholesale sale involves the conflicting interests of more than one state can it be said that there is an essentially national interest involved so that it would be a direct burden upon interstate commerce to permit state regulation.

A sale which affects the interests of the producing state as well as any other states supplied from the same source cannot constitutionally be regulated by any one of those states. However, if that preceding sale is brought under federal regulatory power, any subsequent "downstream" sales of the same energy in the state of ultimate consumption, whether wholesale or retail, are of no concern to any other state, and such sales can constitutionally be regulated by the state of ultimate consumption.

As the Ninth Circuit pointed out, the *Attleboro* decision does not stand in isolation upon this problem of state power to regulate interstate commerce. When *Attleboro* was handed down, it was but the last in a long series of cases bearing upon the problem.

Prior to *Attleboro*, commencing with *Cooley v. Board of Port Wardens* 53 U.S. (12 How.) 298 (1851), this Court had dealt with the matter of state regulation from a very practical view. Regulation which might at first blush clearly appear to have a very direct impact on what was concededly interstate commerce had been held in the absence of federal regulation to be within the regulatory power of the state, for the reason that the concern was local, the need for regulation was due to local conditions, and the service was not such as to demand uniformity of regulation among the states. Under these circumstances, the burden upon commerce which the state regulation constituted was held to be an indirect one and within the area in which state power to regulate existed concurrently with federal power until such time as Congress occupied the field. These concepts are set forth at some length in *Simpson v. Shepard (The Minnesota Rate Cases)*, 230 U.S. 352 (1912). They are carried forward in such cases as *Public Utilities Commission v. Landon*, 249 U.S. 236 (1919) finding that a state could constitutionally regulate the retail rates for gas sold to customers within such state by a distributing company which had purchased the gas from an interstate pipeline company, and *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23 (1920) holding that a state where consumption occurs may regulate retail

sales within that state of gas brought in from out-of-state by the retailer.

The Ninth Circuit properly observed that, with the long history and development of the Supreme Court's interpretation of the extent of state power to regulate interstate commerce and the local need for regulation of interstate commerce where no multi-state concern is involved, it hardly seems reasonable to conclude that *Attleboro* should be read as having substituted a strictly mechanical test (wholesale or retail) for all the considerations theretofore regarded as relevant. Certainly there is no hint in the careful opinion in *Attleboro* that this Court had decided to create such a mechanical test of state constitutional power.

In light of such judicial history it must be concluded from the Court's reasoning in *Attleboro* that only where a multi-state concern exists and where therefore the interest in the transaction is national rather than local in character is a sale at wholesale in interstate commerce constitutionally beyond the reach of state regulation. Conversely it must be concluded that where the need for regulation is due to local considerations not affecting other states and the service is not such as to demand uniformity of regulation among the states, state regulation is constitutionally permissible.

With the extent of the gap thus defined we turn to the action of Congress with respect to it.

2. The Purpose and Design of Congress as Reflected in the Statutory History Was to Fill the Attleboro Gap But to Do No More.

Congress intended by enactment of Part II of the Federal Power Act in 1935, to fill the constitutional gap in state regulation revealed in *Attleboro* and the cases preceding it. Part II was drafted by the FPC's Solicitor DeVane and was "designed . . . to fill the gap in the present state regulation of electric utilities"., Testimony of Commissioner Seavey, *Hearings on H.R. 5423 Before the House Committee on Interstate and Foreign Commerce,* 74th Cong., 1st Sess. 384 (1935). The gap referred to was that revealed in the *Attleboro* decision which was constantly brought to the attention of Congress during its deliberations. H.R.Rep. No. 1318, 74th Cong., 1st Sess. 7 (1935); S.Rep. No. 621, 74th Cong., 1st Sess. 17 (1935).

While Congress's attention was initially focused on the need for regulation which would fill the regulatory gap revealed by *Attleboro* and its predecessors, Congress was equally persuaded that it should not pass any legislation which would in any respect encroach upon the constitutional powers which the state could exercise in the absence of federal statute. In other words, the ultimate intent of Congress was an obverse and a converse of the same objective, to fill the *Attleboro* gap but to do no more. Thus we read in the Senate Committee report:

> "Subsection (a) . . . declares the policy of Congress to extend that regulation to those matters which cannot be regulated by the States and to assist the States in the exercise of their regulatory powers, but not to impair or diminish the powers of any State commission.
>
> • • •

> "The revision has also removed every encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in an effort to prevent the expansion of Federal authority over State matters.
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> • • •
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> "The rate-making powers of the Commission are confined to *those* wholesale transactions which the Supreme Court held in Public Utilities Commission v. Attleboro Steam and Electric Co. (273 U.S. 83) to be beyond the reach of the States." S.Rep. No. 621, 74th Cong., 1st Sess. 18, 48 (1935). (Emphasis added.)

Similar language giving assurance that there would be no encroachment upon state power is found in the corresponding House Report. H.R.Rep. No. 1318, 74th Cong., 1st Sess. (1935).

It must be remembered that in the climate in which Part II was enacted there was great fear on the part of the states that federal regulation might encroach upon that area where the states could constitutionally operate. See statements of John E. Benton, general solicitor of the National Association of Railroad and Utilities Commissioners (NARUC), *Hearings on H.R. 5423 Before the House Committee on Interstate and Foreign Commerce*, 74th Cong., 1st Sess., pp. 1624, 1660-1667, 1677, 1678; *Hearings on S. 1725 Before the Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess., pp. 748-755, 760, 761. It was to allay those fears that the sponsors of the legislation took pains to assure Congress that the bill as revised would do no more than close the gap, as re-

yealed in the *Attleboro* case, where the states were constitutionally forbidden to exercise jurisdiction. Testimony of DeVane, Solicitor, Federal Power Commission, *Hearings on H.R. No. 5423, supra,* p. 494 (1935).

We turn now to a consideration of the words used by Congress to implement the foregoing purposes.

3. Congress, in Enacting Part II of the Federal Power Act, Was Not Seeking to Subject All Wholesale Sales in Interstate Commerce to FPC Jurisdiction.

The hearings before the Senate and House Committees and the committee reports clearly disclose that Congress was concerned with the sale of electric energy to be transmitted over the state line into the state of consumption, and was not at all concerned with any subsequent sales which occurred "downstream" of that point. Indeed, nowhere in these hearings or reports is there any mention of wholesale sales occurring after the sale made from the facilities bringing the power to or across the border of the state of ultimate consumption. Because of this fact, and because Congress was thinking in terms of the constitutional limits of state authority revealed in *Attleboro*, it is fair to conclude that Congress intended to give FPC jurisdiction only over *those* sales where a multi-state concern foreclosed state regulation. The following statutory history leaves little doubt of the soundness of this conclusion.

First, all of those who were concerned with the legislation agreed that the gap to be filled was that created by *Attleboro*. See statements of John E. Benton, Solicitor of the NARUC, *Hearings on S. 1725 Before Senate Committee on Interstate Commerce,* 74th Cong. 1st Sess.

(1935) pp. 767, 768; *Hearings on H.R. 5423 Before House Committee on Interstate and Foreign Commerce*, 74th Cong. 1st Sess. (1935) p. 1656.

Solicitor DeVane of FPC prepared a memorandum on the constitutionality of the bill, in which the following remarks are found (*Senate Hearings, op. cit.*, 797, 800):

> "In denying the power of the Rhode Island Commission to fix the rate for a bulk sale of energy to a Massachusetts company at the State line, the Court said: 'Plainly, however, the paramount interest in the interstate business carried on between the two companies is not local to either State, but is essentially national in character. The rate therefore is not subject to regulation by either of the two States in the guise of protection to their respective local interests; but, if such regulation is required it can only be attained by the exercise of the power vested in Congress.' (*Public Utilities Commission v. Attleboro Steam & E. Co.*, 273 U.S. 83, 90). *The wholesale rates governed by this decision are the only rates which under this title are to be fixed by the Federal Commission.*" (Emphasis added)

The hearings also make clear that Congress was thinking in terms only of lack of state power to prevent the passing on to ultimate consumers of locked-in costs, caused by high rates charged to local utilities by companies over which the states had no jurisdiction. When a company located in another state sold power to an in-state utility, the latter state had no access to the records of the out-of-state company. Even if the state where the energy was to be ultimately consumed could determine whether or not the rate for the wholesale sale preceding delivery to that state was fair, its only sanction in

case of an excessive rate was to disallow a portion of the in-state utility's cost of purchasing such energy. Such action, while protecting consumers, could devastate the local utility. This problem (which is entirely separate from the commerce clause problem posed by *Attleboro*) was a major impetus to the passage of the Act. Remarks of Rep. Monaghan, *House Hearings, op. cit.*, at 761; remarks of John E. Benton, *House Hearings, op. cit.*, at 1654-1657, *Senate Hearings, op. cit.*, at 756-767; remarks of Col. William Chantland, attorney with Federal Trade Commission, *Senate Hearings, op. cit.*, at 116; remarks of Mr. DeVane and Senator Hastings, *Senate Hearings, op. cit.*, at 250.

Once the Federal Government has fixed reasonable rates for the initial wholesale transaction (as in the rates for Hoover energy sold *to* Edison), a state can properly fix a reasonable rate for the operation of the local company. This applies equally whether the local company is selling at retail or at wholesale to local distributors as in the case of the Edison-Colton sales.

The fact is that the types of transactions within a state which would occur subsequent to a federally regulated sale were not brought to the attention of Congress. The absence of consideration of the type of transaction now before the Court helps to explain why the short-hand phrase "wholesale versus retail" was so frequently used in the hearings and reports. It is obvious from the history that such expression was intended as a convenient reference to the constitutional principles in *Attleboro*, and not to a dogmatic proposition that all wholesale sales must be given over to FPC regulation.

This is illustrated by the comment of Benton. While he stated that *Attleboro* had "been accepted by everybody as establishing the distinction between wholesale and retail business and as establishing the fact that the state cannot regulate wholesale transactions . . ." (*House Hearings, op. cit.*, at p. 1657), a few moments earlier, he had revealed exactly what he meant by "wholesale". He said: "The States have long regulated the rates charged by the local distributing companies to consumers; but they cannot reach the interstate *producer* supplying the distributing company." (Emphasis added.) *House Hearings, op. cit.*, p. 1622. The word "producer" implies a company which generates power outside the state, selling it *to* the in-state utility. That word could not be used to describe a local, one-state company which purchases power *from* the out-of-state producer and resells it at wholesale for ultimate consumption within the same state.

4. The Statutory Language Reflects the Purpose and Design of Congress.

The words used by Congress in Part II reveal that they were carefully chosen to fill the constitutional gap and to go no further. Thus we read in Section 201 (a) that Federal Power Commission regulation is to extend to:

> "the sale of . . . energy at wholesale in interstate commerce . . . such federal regulation, however, to extend only to those matters which are not subject to regulation by the States."[5]

In various sections giving a specific grant of authority to the FPC we read language carefully tying back

[5]Sections 201, 202(a), 202(b), 205(a), 206(a), and 208 of the Federal Power Act are set forth in their entirety in the Appendix of this Brief.

to this restriction by limiting the effect of the Act to those rates or those facilities which are "subject to the jurisdiction of the Commission." Thus while the following Section 201 (b) speaks generally of giving the FPC jurisdiction over "the sale of electric energy at wholesale in interstate commerce," the specific Sections 205 (a) and 206 (a) giving the FPC jurisdiction to regulate rates declare that such jurisdiction shall be only over those sales of electric energy which are "subject to the jurisdiction of the Commission". This clause necessitates reference back to Sections 201 (a) and 201 (b) which, when read together, expressly limit the jurisdiction of the Commission to those matters beyond state constitutional power.

This statutory scheme, providing full assurance against encroachment upon that jurisdiction over interstate transactions which the states could constitutionally exercise prior to Part II, was the result of the efforts of John E. Benton, general solicitor of the NARUC. While the NARUC generally favored the proposed legislation, Mr. Benton presented a series of amendments, including the declaration of intention eventually adopted as Section 201 (a), to prevent encroachment upon the existing regulatory authority of the States. Mr. Benton was of the opinion that in addition to the general declaration of intention in Section 201 (a) there should be specific reference to such intention in those sections granting FPC particular jurisdiction over a particular subject such as rates, so that there would be no doubt of preserving state jurisdiction. In the case of those sections granting rate jurisdiction (Sections 205 and 206) this was accomplished by

inserting the clause "subject to the jurisdiction of the Commission", thereby requiring reference back to Section 201(a). See *Hearings on S. 1725 Before Senate Committee on Interstate Commerce*, 74th Cong., 1st Sess., pp. 748-755, 760, 761, 785; *Hearings on H.R. 5423 Before House Committee on Interstate and Foreign Commerce*, 74th Cong., 1st Sess., pp. 1624, 1660-1667, 1677, 1678. After referring to the *Shreveport* case (*Houston, East and West Ry. v. United States*, 234 U.S. 342 (1914) as an instance in which a declaration apparently preserving state jurisdiction over intrastate rates of railroads had given way to the requirement of non-discriminatory rates, Mr. Benton asserted (*Hearings on S.* 1725, *supra*, pp. 760-761):

> "* * * The State commissions do not wish to repeat that experience in the utility field. Accordingly, they have sought in the amendments offered to title II of this bill to separate the field within which the Federal regulatory commission may exercise jurisdiction from that which is reserved to the States, and to make that separation so clear and explicit throughout the bill that there may be no opportunity for judicial construction to make the legislative purpose miscarry."

The Senate Committee Report gives full recognition to the objectives sought by Mr. Benton by commenting that:

> "The limitation on the Federal Power Commission's jurisdiction in this regard has been inserted in each section in a effort to prevent the expansion of Federal authority over State matters". S. Rep. No. 621, 74th Cong., 1st Sess. p. 18 (1935).

The foregoing consideration of the statutory history and of the words used by Congress demonstrates that the Ninth Circuit was correct in its interpretation below.

We turn now to a consideration of the arguments which the FPC has advanced in its attempt to justify its assertion of jurisdiction over Edison's sales to Colton.

B. The FPC's Fallacious Arguments to Support Its Claim of Jurisdiction Under Part II of the Federal Power Act.

1. FPC Relies Upon a Misinterpretation of the Attleboro Decision, or in the Alternative Asserts That Congress Unwittingly Misinterpreted It, or in the Alternative Asserts That Congress Deliberately Abandoned Attleboro.

a. Attleboro Misinterpreted by FPC.

The boldest argument in support of jurisdiction is found in the opinion of the FPC below. Opinion No. 346, R. 839. Without bothering to analyze or even consider the reasoning of the Court in *Attleboro* the FPC simply stated that: "The *Attleboro* case does not limit the rule [prohibiting state jurisdiction] to cases where it can be specifically shown that other states are affected". R. 849. Certainly the carefully reasoned opinion of this Court in *Attleboro*, and the precedents upon which the Court depended, belie such an assertion. This Court said in *Attleboro* (273 U.S. at 90):

> "The test of the validity of a state regulation is . . . whether the particular business which is regulated is essentially local or national in character . . ."

The Court went on to point out specifically what this meant by reciting the facts and showing how regulation by Rhode Island of the rates in question could have a direct economic impact upon the rates which would be charged by the purchaser when it resold the energy in Massachusetts.

b. FPC's Argument That Congress Unwittingly Misinterpreted Attleboro.

As a matter of fact counsel for FPC have made no attempt to justify the above misinterpretation of *Attleboro*. They now take a less extreme, though equally erroneous position. They argue that regardless of the proper interpretation of *Attleboro*, Congress interpreted *Attleboro* as holding that no wholesale sales of energy in interstate commerce could be constitutionally subjected to state jurisdiction, thus concluding that a mechanical cleavage between wholesale and retail sales for jurisdictional purposes precisely measured the constitutional prohibition.

The only appropriate assumption is that Congress as a body is *not* misinformed, and we suggest that it is presumptuous for the Federal Government to argue in this case that at the time of consideration of the amendment of the Federal Power Act in 1935 Congress misunderstood the holding in *Attleboro*. There might conceivably be some basis for such a contention if the holding of the Court were veiled or cryptic, but the contrary is true. Even a hasty reading of the decision reveals the fundamental reasoning of the Court and makes clear that the distinction with which the Court was concerned was the national versus local interest distinction rather than any mechanical cleavage between wholesale and retail.

That Congress was in fact fully informed respecting the holding of *Attleboro* and the line of cases which preceded it was noted by the Ninth Circuit, quoting at length from the remarks of Senator Wheeler in 79 Cong. Rec. 8436, 8437 (1935). R. 947.

c. FPC's Argument That Congress Abandoned Attleboro.

FPC next advances the argument that even if Congress understood *Attleboro* and its underlying reasoning, Congress deliberately abandoned the *Attleboro* test for determining the limits of state constitutional jurisdiction over interstate wholesale sales and substituted the mechanical cleavage test of wholesale versus retail. This contention flies directly in the face of the statutory history outlined above, in which it was demonstrated that it was the intent of Congress to limit FPC jurisdiction strictly to the *Attleboro* gap and not to encroach in *any* respect upon the constitutional power over *any* sales which the states would be able to exercise in the absence of any Federal legislation. We have quoted from the remarks of FPC Commissioner Seavey, and FPC Solicitor DeVane, and we have also quoted from the reports of the respective Senate and House Committees.

If the FPC were now to keep faith with the representations that it made when Part II was being considered, it could not make the argument here under consideration. It is true that the individuals on the Commission and on its staff who guided Part II through Congress are replaced by others, but the current differing views or philosophies of the latter cannot alter the historical fact that such representations were made to Congress and were relied upon to secure passage by Congress.

2. FPC Errs in Contending That the Statutory Language Compels a Mechanical Cleavage Test of Wholesale Versus Retail to Determine the Limits of State Constitutional Power.

FPC argues that the statutory language must be read to say that *every* interstate wholesale sale is placed under

FPC jurisdiction. However, it is plain that even independently of the reference to statutory history the words used by Congress must be read to limit FPC jurisdiction over interstate wholesale sales to *those* interstate wholesale sales which are constitutionally beyond the reach of the States. To accept FPC's rendering is simply to sweep aside that part of the statute which expressly limits the FPC's jurisdiction, thereby violating the fundamental tenet of statutory construction that all of the words of a statute are to be given effect when arriving at its meaning.

The pertinent language in Section 201 (a) is:

> "... Federal regulation of ... that part of such business [of transmitting and selling electric energy for ultimate distribution to the public] which consists of ... the sale of such energy at wholesale in interstate commerce is necessary in the public interest, *such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.*" (Emphasis added.)

The pertinent language in Section 201 (b) is:

> "The provisions of this Part [Part II of the Federal Power Act] shall apply ... to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State, or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line".

The pertinent provisions of Section 205 (a) are:

> "All rates and charges made, demanded, or received by any public utility for or in connection with the

transmission or sale of electric energy *subject to the jurisdiction of the Commission* . . . shall be just and reasonable . . .'' (Emphasis added.)

To test the meaning of these provisions we may take the facts revealed in the Edison-Colton sales. The energy sold to Colton is all consumed locally and there is prior federal regulation of the rates for the only potential out-of-state source, so the interests of only one state, viz., California, are involved. Under those facts, and under the rule laid down in *Attleboro,* California could constitutionally exercise jurisdiction in the absence of Congressional action. Congress did act, and since interstate commerce is involved Congress could have enacted a law removing such a sale from state jurisdiction. However, we know that Congress used the words in Section 201(a), ''such Federal regulation [of the transmission and sale of electric energy at wholesale in interstate commerce], however, to extend only to those matters which are not subject to regulation by the States.''

FPC argues that notwithstanding this language, it is inconsistent with subsequent language in Section 201 (b) giving the FPC jurisdiction over ''the sale of electric energy at wholesale in interstate commerce'', that Section 201 (b) is a specific grant of jurisdiction, and that this subsequent specific inconsistent language must govern. FPC is wrong in arguing that the two sections are inconsistent and FPC is wrong in saying that Section 201 (b) is a specific grant.

It is obvious that the words of the two sections do not have to be read inconsistently. Nevertheless FPC insists

on so construing them, thereby violating the tenet of statutory construction that words in a statute are to be read to harmonize. If Congress had declared in Section 201 (b) that the FPC was to have jurisdiction over "*every* sale of energy at wholesale in interstate commerce" there would indeed have been an inconsistency, but that is not what Congress said. On the contrary, Congress spoke generally in Section 201 (b) using the term "*the* sale of electric energy at wholesale in interstate commerce" (emphasis added), thus permitting the proviso language in Section 201 (a) to operate to save state jurisdiction over those wholesale transactions which a state could constitutionally regulate prior to passage of Part II.

The short of it is that inconsistency can be claimed only if the word "the" in Section 201 (b) is construed to mean "every" or the word "every" is interpolated and read into the phrase "the sale of electric energy at wholesale in interstate commerce". In construing a statute every effort should be made to arrive at a meaning which produces consistency between sections. FPC has bent all its efforts in the reverse direction. It has strained to find inconsistency so that it could avoid Section 201 (a) which operates to prevent the extension of federal regulation into areas of local concern where states may constitutionally regulate.

With a slightly different twist, the FPC next argues that even if the proviso clause of Section 201 (a) preserving state jurisdiction would otherwise control, that section is but a "preamble", stating generalities, and its declaration of intent must give way to a specific grant of power found in subsequent sections. Then it is argued that

Section 201 (b) is a specific grant of jurisdiction to the FPC over every interstate wholesale sale, whereas that section is no more specific than Section 201 (a) with respect to jurisdiction over rates. One must turn to Sections 205 and 206 to find a specific grant of power over rates. Sections 205 and 206 confer rate jurisdiction only over sales "subject to the jurisdiction of the Commission", and one must refer back to Sections 201 (a) and 201 (b) to ascertain that jurisdiction. Thus we come back to the problem of construing Sections 201 (a) and 201 (b) so that they will be consistent. In short, the excursion which FPC's argument takes simply brings one back to the same place without having produced a logical answer.

In presenting its thesis that Section 201 (a) is but a "preamble" entitled to weight only when not superseded by an inconsistent specific grant, FPC devotes several pages of its brief. Pp. 28-30. We have no quarrel with the FPC's presentation of history on these pages, but we can hardly accept the *non-sequitur* conclusion which FPC reaches. The FPC relates how John E. Benton, representing the NARUC, advocated specific limitations in the various sections which now follow Section 201 (a) so that federal jurisdiction would be strictly limited to matters not subject to regulation by the state. While Benton did not distrust a preamble setting forth the limits of jurisdiction, he did distrust any section giving a specific grant of authority unless that section expressly contained the limitation or related back to the limiting provision in the preamble. Thus he urged the insertion of the phrase "subject to the jurisdiction of the commission" in Sections 205 and 206 giving a specific grant of rate jurisdic-

tion. This was in fact done. *Hearings on S. 1725, supra* pp. 748-755, 760-761; *Hearings on H. R. 5423, supra*, pp. 1624, 1660-1667. The Senate Report on this subject (S. Rep. No. 621, 74th Cong., 1st Sess., p. 18) states:

> "... The revision has also removed *every* encroachment upon the authority of the States. The revised bill would impose Federal regulation only over those matters which cannot effectively be controlled by the States. *The limitation* on the Federal Power Commission's jurisdiction *in this regard has been inserted in each section* in a effort to prevent the expansion of Federal authority over State matters ..." (Emphasis added.)

Having thus given excellent historical support for the proposition that the preservation of state jurisdiction was to be set forth not only in the "preamble" (Section 201 (a)), but in each specific section granting FPC jurisdiction over a particular subject, the brief of FPC suddenly makes a reverse switch by declaring that this proposition is the same as saying that the declaration of intent must collapse whenever a grant of power is found. Brief, p. 28.

The error of FPC's position is compounded by its treatment of Section 201 (b) as the section specifically granting rate jurisdiction. If we refer to Sections 205 (a) and 206 (a) which are the only specific grants to the FPC of rate regulatory power, we read that the power specifically extends in each of these sections only to those interstate wholesale sales of electric energy which are "subject to the jurisdiction of the Commission". This phrase of limitation, as we have noted, requires reference back to Sections 201 (a) and 201 (b), which when read

together in harmony, can only mean that *those* wholesale sales which cannot constitutionally be reached by the states are the subject of a specific grant of FPC jurisdiction.

The ultimate question can be simply put. Where a factual situation does arise, as in the case at bar, involving an interstate wholesale sale involving the interests of only one state, is Part II to be interpreted woodenly so that such wholesale sales are to be treated like the generality of wholesale sales involving multi-state interests, or is the Court to heed the fundamental underlying promise of Congress, expressed in Section 201 (a), to leave with the states the jurisdiction which they could exercise over such a sale prior to the enactment of Part II? That the latter alternative is the only right answer seems obvious. This is the answer which the Ninth Circuit gave, properly conceiving its function to be ". . . imaginatively to extrapolate the contemporaneous answer that the Legislature [Congress] would have given to an unconsidered question . . ." Mr. Justice Frankfurter in *F.H.A. v. The Darlington*, 358 U.S. 84, 92 (1958) (dissenting opinion).

3. FPC Errs in Contending That the Decisions of This Court Require a Mechanical Cleavage Test of Wholesale Versus Retail to Define the Limits of FPC Jurisdiction.

In no case decided by this Court, under the Federal Power Act or Natural Gas Act, has FPC jurisdiction ever been imposed upon an Edison-Colton type sale. Nor, with one exception, has this result ever been reached by any court. In numerous decisions, the Court has upheld FPC jurisdiction over sales at wholesale in interstate commerce,

but in each such case the sale was either the first sale for resale following generation or production or involved the sale of gas or electricity to be later consumed in more than one state. The common denominator of these cases is that the wholesale rates to be charged had a direct and immediate effect upon rates to be thereafter charged to consumers in another state. This circumstance is not present in the sale by Edison to Colton.

An analysis of the facts in each of the cases cited by FPC (Brief, pp. 20-27) will disclose their distinguishing differences from the case now before the Court.

In *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U.S. 498 (1942), the question was whether the Illinois Commerce Commission could, consistently with the provisions of the Natural Gas Act, order the Illinois Natural Gas Company to extend its facilities for purposes of making sales to Central Illinois Public Service Company. Illinois Natural, a wholly-owned subsidiary of Panhandle Eastern Pipeline Company, took delivery of natural gas from the interstate pipeline of its parent company, within Illinois. In holding that the state commission could not order the extension the Court relied upon Section 7 (c) of the Natural Gas Act which prohibits such construction without FPC approval where a proposed extension will be used either for the transportation of gas in interstate commerce, or for sales of gas for resale in interstate commerce.[6] The decision of the Court could have rested upon either the fact of transmission or upon the fact of a proposed sale for resale; the Court mentioned both. 314

[6]The Federal Power Act contains no requirement equivalent to Section 7(c) of the Natural Gas Act.

U.S. 498, 508. Under the rationale of the later decision in *FPC v. East Ohio Gas Co.*, 338 U.S. 464 (1950), it would have made no difference to the result in *Illinois Natural* whether the sale made from the proposed extension was at wholesale or retail because in either case there would be interstate transmission which alone is sufficient to establish certificate or accounting jurisdiction.

There are two reasons; in *Illinois Natural*, why an extension of facilities should be of national interest. First is the fact that the delivery by Panhandle to Illinois Natural was a sale from a parent to its wholly-owned subsidiary. Under the circumstances, the Court actually characterized the subsequent sales *by* Illinois Natural as the first sales for resale. 314 U.S. 498, 508. Second is the fact that Central Illinois had an existing out-of-state source of natural gas; a connection with Universal Gas Company at the *Indiana* state line. 314 U.S. 498, 503, 508. See *Universal Gas Co. v. Central Illinois Public Service Co.*, 102 F.2d 164 (CA7 1939). Central Illinois (unlike the City of Colton) would have had sources of gas from two states, had the extension been permitted—an obvious example of multi-state, and therefore national, concern. The Court was well aware of this, since, under Section 7 (c) of the Gas Act, as then written,[7] the market to be served by a proposed extension had to be served by another natural gas company before the FPC had jurisdiction over the extension. 52 Stat. 825 (1938).

Illinois Central is to be distinguished from the instant case; not only because *Illinois Central* involved certificate

[7] The original text of Section 7 (c) is quoted in the Appendix to this Brief.

jurisdiction under Section 7 (c) which can be predicated on interstate transmission even if the gas were sold at retail, but because the extension of facilities ordered by the State of Illinois could have a direct and immediate effect upon the sources of gas used to serve other states.

The next decision cited by FPC is *Colorado-Wyoming Natural Gas Co. v. Federal Power Commission*, 324 U.S. 626 (1945). In that case, natural gas from Texas wells moved north into Colorado in the pipeline of Colorado Interstate Gas Company. At Littleton, Colorado, connection was made with Colorado-Wyoming. Gas there sold to Colorado-Wyoming moved north in its pipeline, across the state line to Cheyenne, Wyoming. Along the way, sales at wholesale and retail were made both in Colorado and in Wyoming. Colorado-Wyoming admitted that the Wyoming wholesale was within FPC's jurisdiction, but contended that the wholesale sales in Colorado (which occurred after the federally regulated sale by Colorado Interstate) were not. *Colorado-Wyoming* on its facts cannot support a reversal of the Ninth Circuit's decision in the instant case even if, as FPC argues, the Court placed no reliance on the Wyoming sale. FPC Brief, p. 24. It is plain that the Colorado resales in that case were made from a pipeline serving more than one state. They were *Attleboro*-type sales, because any rates set for them would directly affect the later, or downstream, sales in Wyoming. It would have been highly anomalous if the dead-end sale in Wyoming were federally-regulated, while the upstream sales in Colorado were regulated by the State of Colorado. Under those circumstances, nothing the FPC could do by way of regulating the Colorado Interstate-Colorado Wyo-

ming sale could overcome the multi-state effect which would occur if Colorado attempted to regulate the wholesale sales by Colorado-Wyoming in Colorado. For this reason, of course, Colorado-Wyoming did not and could not make the contention that the interests of only one state were involved. It relied, instead, on the long-discredited view that interstate commerce came to an end at some point before the Colorado sales (though magically revived when the pipeline crossed the Wyoming border!).

The two *Panhandle Eastern* cases cited by FPC (Brief pp. 20-21) held, respectively, that all retail sales, even in the case of large-volume industrial sales, were beyond the power of the FPC to regulate, so that the state of consumption could both set the rates and impose a requirement of public convenience and necessity. *Panhandle Eastern Pipeline Co. v. Public Service Commission of Indiana*, 332 U.S. 507 (1947); *Panhandle Eastern Pipeline Co. v. Michigan Public Service Commission*, 341 U.S. 329 (1951). In so doing, the Court simply re-emphasized the rule of Constitutional law established in *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23 (1920): "... The Supreme Court has from the beginning allowed the state both to tax and to fix the price on the first sale or delivery of gas or electricity brought in from a sister state when and if this first sale is also necessarily the last sale because consummated by consumption." *Indiana Panhandle* decision, supra, 332 U.S. 507, 517, n. 12, quoting Powell, Note, Physics and Law, 58 Harv.L.Rev. 1072, 1082 (1945).

In the *Michigan Panhandle* decision, it was held that the state of consumption could impose a requirement of public

convenience and necessity upon direct industrial sales of interstate gas.

In both decisions, the Court emphasized that retail sales were absolutely excluded from federal regulation. FPC, in citing these decisions, apparently seeks to persuade the Court that the absolute exclusion of retail sales implies the absolute inclusion of wholesale sales. On the contrary, the Court in those opinions made clear that the exclusion of retail sales was based upon Constitutional principles, and that those principles rested upon the fact that retail sales are always of primarily local concern. The Court went to some length, in the *Michigan Panhandle* case, to explain the local impact of the proposed direct sale to the Ford Motor Company, concluding that the situation was "... of 'essentially local' concern and of vital interest to the State of Michigan." 341 U.S. 329, 333-334.

In *Walling v. Jacksonville Paper Co.*, 317 U.S. 564 (1943), the Price Administrator argued (much as FPC does here) that the exception of certain employees engaged in *retailing* from the provisions of the Fair Labor Standards Act, 29 USCA Sec. 213(a) (1), (2), necessarily implied the *inclusion* of employees engaged, under similar circumstances, in *wholesaling*. The Court rejected the argument. The significance of that decision in this case is particularly apparent by reference to the Court's statement (317 U.S. 564, 570): "... we cannot be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states."

Federal Power Commission v. East Ohio Gas Co., 338 U.S. 464 (1950), was not a rate case. The question was

whether East Ohio, operating solely within one state, was a "natural gas company" within the meaning of Section 2 (6) of the Natural Gas Act, 15 USCA Sec. 717 a (6) and therefore was obligated to observe certain accounting and reporting requirements of FPC. The subsection provides:

> "(6) 'Natural-gas company' means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale."

Since East Ohio was clearly transporting gas in interstate commerce, it was properly held to be a "natural gas company" whether or not it made sales for resale. Similarly, Edison is a "public utility" within the meaning of Section 201 (e) of the Federal Power Act, because it owns facilities for the transmission of electric energy in interstate commerce. Its "public utility" status is entirely independent of the existence of the Edison-Colton sale. See *Federal Power Commission v. Arizona Edison Co.*, 194 F.2d 679 (CA9 1952).

FPC claims (Br. pp. 24-25) that *Pennsylvania Water & Power Co. v. Federal Power Commission*, 343 U.S. 414 (1952), upheld FPC jurisdiction over Penn. Water's wholesale sales in Pennsylvania even though prior wholesale sales to Penn. Water in Pennsylvania were also subject to FPC regulation. What FPC ignores is that under the facts in that case federal regulation of the prior wholesale sales did not achieve insulation from multistate concern because the energy sold to Penn. Water might thereafter be consumed not only in Pennsylvania but in Maryland and even Washington.

The only prior federally-regulated sale to Penn. Water in Pennsylvania was a sale of Pennsylvania-generated energy from an affiliate, Safe Harbor Water Power Corp. That sale was federally-regulated because increments of Safe Harbor energy were sometimes transmitted to Maryland. At such times, the Safe Harbor-Penn. Water sale was in interstate commerce. See *Safe Harbor Water Power Corp. v. Federal Power Commission*, 179 F.2d 179 (CA3 1949), *cert. denied*, 339 U.S. 957. The only out-of-state source for the energy sold by Penn. Water to local Pennsylvania utilities was energy purchased by Penn. Water in Maryland from its affiliate Consolidated Gas Electric & Power Co., and transmitted to the Maryland Pennsylvania state line by Susquehanna Transmission Company, another Penn. Water affiliate. The state line delivery from Susquehanna to Penn. Water was not a sale; the Commission treated Susquehanna and Penn. Water as one unit, including the properties of the former in the rate base of the latter. See *Pennsylvania Water & Power Co.*, 8 F.P.C. 1, 98 (1949). Thus, as to the interstate increment of the energy sold by Penn. Water to local Pennsylvania utilities, there was no prior federally-regulated sale in Pennsylvania and the local sales were the first sales for resale in the state of consumption.

United States v. Public Utilities Commission, 345 U.S. 295 (1953) dealt with a sale for resale in the exporting state. Such a sale, being a first sale for resale of energy for transmission and sale in another state, involved a demonstrable multi-state interest as did the *Attleboro* sale. Likewise, sales by independent gas producers to interstate pipelines are export sales for transportation and sale in other states. They affect the interests of more

than one state and are subject to FPC jurisdiction. *Phillips Petroleum Co. v. Wisconsin*, 347 U.S. 672 (1954). Sales which occur upstream of the state of destination have a clear effect upon more than one state. Conversely, when the price has been fixed for gas or electric energy entering the state of ultimate consumption, no subsequent sale can have such an effect.

The one decision which FPC can properly cite in support of its thesis is *Wisconsin v. Federal Power Commission*, 201 F.2d 183 (CADC 1952), *cert. denied*, 345 U.S. 934. We submit that the Court of Appeals based its conclusion upon a patent misunderstanding and that the case was incorrectly decided. The Court of Appeals for the District of Columbia relied strongly upon a single case, saying, 201 F.2d 183, 185:

> "We think the petitioner's principal contentions are disposed of by the able opinion of the Seventh Circuit in Wisconsin-Michigan Power Co. v. Federal Power Commission, 1952, 197 F.2d 472, a case which arose upon strikingly similar facts."

The truth is that the facts were strikingly *dissimilar*. *Wisconsin-Michigan* involved sales for resale in the state of consumption which were not preceded by a federally-regulated sale fixing rates for the imported energy. In that case, the company making the sales in issue had generated and imported the energy with its own facilities. There was, therefore, no opportunity for prior federal regulation of the rate for such out-of-state energy. In the later *Wisconsin* decision the Court did not consider, nor even mention, the prior sale for resale which was regulated by FPC. It is necessary to examine the Commis-

sion's decision to discover that sale. See *Interstate Light and Power Co.*, 10 FPC 225 (1951).

With the last-named exception, the cases cited by FPC and discussed above do not support the thesis that all wholesale sales are within the regulatory power of the Commission. Because the cases decided by this Court involved, in every instance, *Attleboro*-type sales, the case at bar is fully distinguishable and statements of this Court in those cases indicating that FPC has jurisdiction over all wholesales are dicta to be read in context with the issue then confronting the Court. In no case has this Court ever held that FPC has jurisdiction over an Edison-Colton type sale. Therefore, the principle of *stare decisis* in no way hinders the affirmance of the Ninth Circuit's decision herein.

4. FPC Draws an Erroneous Conclusion From the History of the Hinshaw Amendment Under the Natural Gas Act.

The Hinshaw Amendment, Public Law No. 323, 83rd Cong., ch. 115, 2d Sess., 68 Stat. 36,[8] followed in the wake of *Federal Power Commission v. East Ohio Gas Co.*, 338 U.S. 464 (1950), in which the Federal Power Commission was sustained in requiring a gas company transporting interstate gas in only one state to keep accounts and submit reports. The majority of this Court declared that the East Ohio Company fell squarely within the language of the Natural Gas Act giving the FPC jurisdiction over "transportation of natural gas in interstate commerce". The case was not concerned with sales for resale. The

[8]The Hinshaw Amendment is Section 1(c) of the Natural Gas Act, added in 1954. The text of Section 1(c) is set forth in the Appendix hereto.

majority rejected the contention that since the accounting practices of the East Ohio Company were admittedly subject to state regulation by the State of Ohio, federal regulation was precluded. As the majority declared: "Nor does the Act purport to abolish all overlapping".

The *East Ohio* case is significant in bringing to the fore the strong belief by Mr. Justice Frankfurter and by Justice Jackson that even the overlap upon State jurisdiction permitted by the majority opinion violated the limitation upon FPC jurisdiction which the Natural Gas Act was represented to Congress to achieve. As Justice Jackson wrote in the dissenting opinion (338 U.S. at 476):

> "The key to an understanding of the Federal Natural Gas Act is its purpose to supplement but not to supplant state regulation".
>
> . . .
>
> "I think that observance of good faith with the states requires that we interpret this Act as it was represented at the time they urged its enactment, as its terms read, and as we have, until today, declared it, viz., to supplement but not to supplant state regulation. What amounts to an entrapment of the state agencies that supported this Act under the representation that it would not deprive them of powers but would only make their powers effective will probably not make it easier to get needed regulatory legislation in the future."

It was not long after the *East Ohio* case that Congress enacted the Hinshaw Amendment whose effect was to preclude federal jurisdiction over persons engaged in the transmission or sale at wholesale in interstate commerce of natural gas received by one entity from another within

or at the boundary of a state if all the natural gas so received is ultimately consumed within such state, provided the rates and service of such first entity are subject to regulation by a state commission. The amendment declared in part:

> "The matters exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States".

The Hinshaw Amendment was considered by Congress to be no more than a clarification of its original intent. Thus we read in the Senate Committee Report:

> "In making this clarification the legislation reaffirms and is thoroughly consistent with the original intent of Congress in enacting the Natural Gas Act; namely that the act was to supplement, and not supplant state regulation". S. Rep.No.817, 83d Cong., 2d Sess., 1954, 1954 U.S. Code Congressional and Administrative News, 2101, 2102.

By parity of reasoning it seems clear that Part II of the Federal Power Act should now be construed, without the need for clarifying legislation, to preserve state jurisdiction and to preclude FPC jurisdiction over Edison's sales to Colton.

FPC asserts that this reasoning is wrong despite the statement in the Senate Committee Report because Congress did not merely clarify the existing Natural Gas Act but imposed a condition that state jurisdiction would obtain only if the state had a regulatory commission. From this circumstance, and from the fact that a proposal to amend the Federal Power Act in a manner similar to

the Hinshaw Amendment was not adopted, FPC argues that Part II of the Federal Power Act should not be construed to limit FPC's jurisdiction. Brief, pp. 39-41. This reasoning is in error.

First it should be noted that the Natural Gas Act did not contain the same express declaration of intent which is found in Section 201 (a) of the Federal Power Act, ("federal regulation . . . to extend only to those matters which are not subject to regulation by the States"). Had there been such an express declaration of intent, *East Ohio* may well have been decided the other way, obviating the need for Congress to enact an express limitation to effectuate its original intent.

Secondly, the fact that the Hinshaw Amendment may be something more than a clarification because it does permit FPC jurisdiction where a state has no regulatory commission having jurisdiction, does not detract from the fact that it is still essentially clarifying legislation notwithstanding any refinements added by Congress.

Thirdly, when an amendment is stated to be a clarification of existing law, such legislative construction is an important circumstance for consideration in interpreting the original statute. *F.H.A. v. The Darlington*, 358 U.S. 84, 90 (1958), *Socony Mobil Oil Co., v. United States*, 287 F.2d 910, 914 (Ct. Claims 1961). As the Arizona Supreme Court put it clearly:

> ". . . an amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act. The rule seems to be well established that the interpretation of a statute by the legislative depart-

> ment goes far to remove doubt as to the meaning of the law. The court has the right and the duty, in arriving at the correct meaning of a prior statute, to consider subsequent legislation. 50 Am.Jur. 328, Sec. 337, title 'Statutes.'" *General Petroleum Corp. v. Smith*, 62 Ariz. 239, 157 P.2d 356, 360 (1945).

In *Sioux Tribe of Indians v. United States*, 316 U.S. 317, 329-330 (1942), this Court held that a declaration made by the same congressional committee which reported out a bill, "within five years of its passage, [was] virtually conclusive as to the significance of that Act."

Here we have a unique situation arising from the fact that the Federal Power Act, Part II, and the Natural Gas Act are so similar that construction of one is generally tantamount to construction of the other. See cases collected in the Government's brief, footnote 12, page 20. Hence the experience under the Natural Gas Act with *East Ohio* and the subsequent clarifying Hinshaw Amendment may appropriately be considered conclusive in construing the Federal Power Act, Part II.

5. FPC Attempts to Obfuscate the Fact That the Edison-Colton Sales Are of Concern Only to California.

FPC at the tag-end of its opinion below, R. 837, finally comes up with the announcement that, anyway and regardless of the validity of other arguments, Edison's sales to Colton affect the interests of more than one state so jurisdiction must rest in FPC. These are the words in its Opinion No. 346 below (R. 850-851):

> "In any case, more than one state is affected by the interstate wholesale made by Edison.
>
> . . .

"The way in which the operation of Colorado River plants are [sic] integrated and the amount of energy taken by Edison or by the City of Los Angeles, or by any other allottees of energy at one time is of interest to the other allottees, including the states of Nevada and Arizona. The energy sold to Colton is part of this picture.

"Thus, the wholesale, or bulk sale of electric energy here, as in other cases, concerns more states than one and is subject to federal regulation under the Federal Power Act and not to state regulation".

This line of reasoning is devious and misleading. It implies that the rates which Edison charges to Colton affect the allotments of Colorado River energy between Arizona, Nevada and California. This is untrue. The terms of the Boulder Canyon Project legislation, the contracts authorized and entered into thereunder, and the administration thereof by the Secretary of the Interior show, without room for misunderstanding or argument, that the allotments are fixed and indeed must be fixed without reference to what Edison charges to Colton.

The issue is not whether more than one state has an interest in allotments, but whether more than one state has an interest in the rates which Edison charges to Colton. There is no relationship between the two; the allotments have no bearing on what Edison charges Colton, and by the same token Edison's charges to Colton do not in any way affect the allotments of Hoover energy. Thus it is false logic to say that because three states have an interest in the allotments, three states must have an interest in Edison's charges to Colton.

The reason why neither Arizona nor Nevada can be prejudiced by the level of Edison's rates to Colton lies in the fact that Edison's sale for resale is preceded by a prior sale for resale by the United States through the Department of the Interior to Edison. It cannot be doubted that this prior sale falls within the *Attleboro* gap and is exempt from state regulation and would be subject to FPC jurisdiction but for the fact that Congress under the Boulder Canyon Project Act has placed such prior sale under the jurisdiction of another federal agency, viz., the Secretary of the Interior. The very fact that this prior sale is made at rates fixed by the United States, insulates the other states against any possible interest in the subsequent sale by Edison to Colton. The Edison-Colton sale is therefore *not* within the *Attleboro* gap.

Since only California consumers can be affected by the rates fixed for the Edison-Colton sale, it follows that there is no constitutional inhibition to California's exercise of rate jurisdiction over the sale. Thus under the rationale of the *Attleboro* case and the proper construction of Part II of the Federal Power Act, jurisdiction by the Federal Power Commission is precluded. Therefore, such sale may continue to be effectively and appropriately regulated by the California Commission.

It is significant that neither Arizona nor Nevada where part of the Hoover energy is generated showed any interest in the present proceedings, nor had any occasion to show any interest. Only California showed such an interest. The California Commission's exercise of jurisdiction over the charges by Edison to Colton could not result

in a self-interest determination which would benefit California to the detriment of Arizona or Nevada.

We submit that the Ninth Circuit handled this subject well when it said (R. 943-944):

> "In the case at bar . . . [unlike *Attleboro*] the sale from which the interstate transmission springs is already under federal control through federal sale of the power to the Metropolitan Water District and direct federal participation in the resale to Edison. Any conceivable conflict of interest among Arizona, Nevada and California with respect to the operation of Colorado River plants and the allocation of energy from them is thus totally subject to federal regulation through the United States' position as lessor of the generators at Hoover, Parker and Davis. [The court here makes a footnote reference to 26 FPC 223, 229-230 (1961)]. The only other possibility of multi-state concern with the Edison-Colton sale would seem to rest upon Nevada's desire to protect Edison's customers in that state through securing for them the rate benefit which a profitable rate to Colton would permit. This possibility is nullified by the fact that Edison's sales are all within California. Nevada has no resident customers to protect. While this situation might be subject to change were Edison to begin to operate as a public utility in Nevada, Edison has never so operated in the past and has no present plans to expand its sales beyond the borders of the southern portion of California. It would be pure speculation to predict that it will serve Nevada in the future.
>
> "The lack, in this case, of any interstate conflict of interest not already subject to federal regulation is, we feel, decisive. It is one thing to say that where more than one state will feel the impact of a regula-

> tion of interstate energy, the states may regulate only sales at retail, since sales at wholesale under these circumstances remain essentially national rather than local. It is quite another thing to say, as does the Federal Power Commission, that all sales at wholesale are essentially national, irrespective of a complete lack of interest on the part of any other state".[9]

In its extreme efforts to try to prove that states other than California can be affected by Edison's sale to Colton, the FPC's brief launches upon an argument that if this were an antitrust case it would be necessary to prove no more than that interstate commerce is involved, in order to sustain federal jurisdiction, and the FPC brief remarks, with an intended hint at humour, that under those circumstances, "no matter how local the squeeze, interstate commerce would feel the pinch", citing *United States v. Women's Sportswear Association*, 336 U.S. 460. Brief, pp. 11, 31. This argument merely reveals the FPC's consuming desire to assert jurisdiction even where Congress has declined to give it. We have assumed for argument that the Edison-Colton sale is in interstate

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[9]The brief of the FPC before this Court improperly seeks to go outside the record by referring to the proposed merger of Edison with California Electric Power Company and suggests that perhaps Edison may make sales outside California in the future. Brief, p. 33, footnote 18. This constitutes a flagrant attempt to influence this Court by asking it to consider circumstances which may occur in the future and is particularly improper where, as here, a claim for refunds for a substantial past period is involved.

In attempting to go outside the record, FPC nevertheless carefully refrains from referring to the fact that in Edison's petition for rehearing before the FPC, Edison offered to prove, but was denied the opportunity to prove, that the flow of energy across a state line upon which FPC had relied to assert jurisdiction had now ceased, thus rendering the entire issue moot. R. 883-884.

commerce. Unlike the provisions of the Sherman Act, jurisdiction does not rest in the FPC merely upon proof that the sales are in interstate commerce. There is a reason for this difference. The prior federal regulation of Edison's only purchase of out-of-state energy precludes the economic impact on other states. The Sherman Act on the other hand, is directed toward economic evils present in unregulated interstate transactions. Furthermore, we have already shown that Congress was strongly motivated to preserve for state jurisdiction those *interstate* wholesale sales which the states could constitutionally regulate prior to the passage of Part II of the Federal Power Act.

C. FPC Argues for Additional Jurisdiction Notwithstanding the Limits Imposed by Congress.

It is perhaps significant that the policy argument in FPC's brief (pp. 30-42) has not been made at any earlier stage in this proceeding. It may be characterized as a plea to this Court to enlarge upon the jurisdiction granted by Congress simply on the ground that it would be good for the country.

1. This Court's Traditional Test of National Versus Local Interest Provides a Far More Practical and Workable Basis for Defining the Limits of FPC Jurisdiction Than FPC's Proposed Mechanical Cleavage Test of Wholesale Versus Retail.

FPC argues that the test developed by this Court over a period of better than 100 years for defining the limits of the jurisdiction which states may constitutionally exercise over interstate commerce should be discarded because it is "troublesome in application". Brief p. 30.

It must be acknowledged that much of the law has to do with the application of dividing lines. The limitations upon FPC jurisdiction which the Ninth Circuit below has recognized simply illustrate the dividing line inherent in our federal system. That line is determined by consideration of national versus state interest. The FPC is wrong in implying that its proposed mechanical wholesale versus retail test entails fewer problems in application than the national versus local interest test developed by this Court. The contrary is true, as this very proceeding demonstrates.

What the FPC fails to mention is that its wholesale versus retail test would inevitably increase the number of occasions when proof would be required that interstate energy reached a particular buyer, and this in turn would almost always require a case-by-case analysis of complicated power-flow studies. This was indeed the approach taken by the FPC below. Almost the entire record in the proceeding was devoted to the FPC staff's attempts to trace energy from the Colorado River hydroelectric plants to the gates of Colton, and to Edison's rebuttal proof through the testimony of an electrical engineer of wide renown and experience, that no such conclusion could properly be made from the facts which the record presented. As FPC attempts to extend its jurisdiction to sales which are more and more remote from a source of out-of-state generation, the complexities of tracing must be compounded in proportion to that remoteness.

Contrast this with the simple manner in which the FPC could have disposed of the present case if it had followed the national versus local interest pattern of *Attleboro*

and the cases preceding it. The FPC could have *assumed*, just as the Ninth Circuit did for purposes of considering the national versus local interest, that interstate energy reached Colton. It then could have examined the facts to determine whether a state other than California could be affected by the rates which Edison might charge Colton. This, as the Ninth Circuit demonstrated, is a relatively simple undertaking. The Court found that the Edison-Colton sale was insulated from multi-state concern because (a) the only potential source of out-of-state energy was purchased by Edison at rates fixed by the Federal Government, and (b) Edison made no sales of energy which would be consumed outside California, i.e., the energy sold by Edison to Colton was for local distribution and consumption. As the Ninth Circuit put it the issue turned on whether "the original sale for interstate transmission is under federal control and no other state is affected in any way by regulation of the subsequent transaction" (R. 951).

The simple truth is that if the FPC had accepted the law as enunciated by the Ninth Circuit, the case against Edison could have been dismissed upon substantiation of the uncontested facts noted in clauses (a) and (b) of the paragraph just above. Indeed, since such facts are uncontested it is more than probable that FPC could have satisfied itself informally of such facts, thereby obviating the expensive, time-consuming power-flow studies which FPC and Edison were required to make and, for all practical purposes, could have eliminated the need for any hearing at all. FPC is obviously aware of the advantage of basing its claim to jurisdiction on a factual ground

(tracing power flows) rather than a legal ground (national versus local interest) because of the reduced risk of reversal by the courts.

2. Congress Determined in the Federal Power Act, Part II, to Use the National Versus Local Interest Test Adopted by This Court Rather Than the Interstate Commerce Test of the Sherman Act.

FPC admits in its brief that the national versus local interest test is one which can be applied simply, under the guides set forth by the Ninth Circuit. But, says FPC, "This simplicity would be achieved at the expense of effective regulation". Brief, p. 12.

All the FPC is really arguing for is more comprehensive authority than Congress gave it. "Effective regulation" in the FPC's thinking should be equated with "federal regulation to the exclusion of state regulation". This reflects a parochial preoccupation with the concept that federal regulation is good *per se*, and an apparent lack of awareness that in areas of purely local concern a strong commission such as the California Public Utilities Commission, because of its more intimate knowledge of, and responsiveness to, local conditions, is in a position to do a more comprehensive, more coordinated job of regulating than the FPC which must devote its attention to matters of national concern.

Congress was persuaded of the wisdom of leaving with the states the jurisdiction over matters of local concern which the states could constitutionally regulate prior to Part II. As Congress implemented this concept in Section 201 (a), "such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States". Yet, the FPC is now urging that if

interstate commerce is involved, the FPC *must* be allowed to regulate. FPC refers to the Sherman Act and points to the fact that Congress made the federal antitrust laws apply whenever the transaction is "in interstate commerce". FPC does not see why this should not be the test for its jurisdiction too. As the FPC puts it in its brief, "Certainly, there is no basis for assuming that a wholesale transaction in interstate commerce, because it takes place entirely within a single State is not a subject of federal concern". Brief, p. 11. To the contrary, this Court has held that there are many aspects of interstate commerce where the interest is primarily local and state regulation is proper. See, for instance, *Pennsylvania Gas Co. v. Public Service Commission*, 252 U.S. 23 (1920). Moreover, Congress did *not* use the language of the Sherman Act when it adopted Part II of the Federal Power Act. Instead Congress refused to extend FPC jurisdiction to *any* interstate retail sales and refused to extend FPC jurisdiction to *those* wholesale sales where, as in the case of interstate retail sales, the interest is primarily local.

3. FPC's Jurisdiction Over Interstate Power Pools Is in No Wise Impaired by Application of the National Versus Local Interest Test of Jurisdiction Over Wholesale Sales.

FPC next attempts to create the impression that rates of interstate power pools which have been committed to FPC jurisdiction cannot be effectively regulated unless FPC is also given jurisdiction over rates which *have not* been so committed. Such an impression would be false for FPC's regulation of interstate power pools is in no wise impaired by its absence of jurisdiction over the

kind of wholesale sales which fall in the Edison-Colton category.

Interstate power pools by definition involve sales, by each member, of energy to be thereafter consumed in another state and FPC has jurisdiction to regulate the rates or charges by each member to other members of the pool. As a consequence, a member which operates in only one state obtains out-of-state energy from the pool at rates fixed by FPC. Conversely, the energy which it supplies to the pool for use in other states is sold at rates fixed by FPC. Furthermore, a member of an interstate power pool, though operating in only one state, necessarily transmits energy in interstate commerce and is a "public utility" within the meaning of Section 201 (e) of the Federal Power Act, whether or not it also makes other sales to local distributors of energy to be consumed in the same state in which the pool member operates.

Under Section 208 FPC has access to the books and records of a public utility in order to ascertain the cost of each item of its property, the depreciation thereof and all other facts necessary for the purpose of fixing such rates as are within its jurisdiction. The company is also required by that section to furnish FPC an inventory of all its property and to keep FPC informed "regarding the costs of all additions, betterments, extensions and new construction". Thus FPC with respect to such company would have on hand all the information necessary for the determination of proper rates for the wholesale sales to the power pool by that company of energy to be consumed in other states and for the purchases of out-of-state energy.

FPC, however, also expresses concern over state regulation of subsequent wholesale sales by that company for consumption within the state where that company operates. If we analyze such a subsequent sale we see that any out-of-state energy involved has already been the subject of federal regulation. So far as any such "downstream" sales are concerned, the only out-of-state costs incurred by the seller have been fixed in the prior federally regulated sale. The only remaining regulatory task is to apportion the total cost of the utility operation (cost incurred in the state of operation plus the federally fixed out-of-state cost) among the various purchasers within that state. The division of these costs among ratepayers, all of whom are located in a single state, is the proper function of the state regulatory commission, while other states need have no concern about being burdened with improper costs because the federal Government has full authority to protect their interests by its regulation of the interstate power pool transactions. Notwithstanding these circumstances, FPC says that the cost estimate made when it passes upon a power pool sale "does not constitute a full determination as to the justness of the arrangement . . .". Why this should be, in view of FPC's access to complete cost information with respect to every "public utility", does not appear. FPC further states that ". . . so fluid are the technical operations of the pool that cost determinations, once made by the Commission, may easily become outdated." If this is true then the rates set for the initial sale for resale may be re-examined at any time by FPC in order to correct whatever has become "outdated".

A final contention by FPC with respect to power pools is that "Edison's approach" would restrict FPC's authority to order members of an interstate power pool to make interconnections. No such restriction exists, however, because FPC's statutory authority with respect to interconnection extends to all "public utilities". Public utility status can be based solely upon interstate transmission and does not depend upon FPC's authority to regulate the rate of any subsequent sale to a local distributor. Section 201(e).

FPC's argument in this regard is most misleading because of its failure to distinguish the establishment of interconnections to facilitate the *interchange* of power, from the entirely different arrangement where a sale at wholesale is made to a distributor of energy for local *consumption*. FPC's announced purpose of encouraging power pools can only be served where the distributing company has generating facilities so that it could interchange power with the wholesaler. If it interchanged power with the wholesaler and such power ultimately moved outside the state, thereby affecting the interests of more than one state, then the transaction would come under FPC jurisdiction, and this particular problem raised by FPC would be moot. On the other hand, if (as is the case with Colton) the distributor has no generating facilities, then it could not interchange power with the wholesaler and therefore, by definition, could not qualify for membership in an interstate power pool. The underlying principle involved is that the Edison-Colton type of wholesale sale is of primarily *local* concern.

One final point must be made with respect to interstate power pools. The Commission has no power to order interconnections, except as to "public utilities". Many existing electric utilities operate entirely within a single state and have no interstate connections, and therefore are not "public utilities". As to those companies, membership in an interstate power pool will of necessity be voluntary. In many cases such membership may be desirable. FPC's efforts to encourage interstate power pools will, we submit, be severely hampered if utilities currently operating only in intrastate commerce, or those like Edison which purchase their out-of-state energy at federally regulated rates, could join interstate power pools only on the condition that the rates for all of their existing sales to local distributors must, *ipso facto*, shift from state to federal regulation. Such a disruption of established regulatory patterns was never within the contemplation of Congress or of the states when FPC's authority was defined by the Federal Power Act.

D. Public Policy Requires That the Edison-Colton Sale Be Regulated by the California Commission.

All of Edison's sales have been regulated by the California Commission since 1911 when that Commission was created. All of the energy which Edison sells, whether wholesale or retail, is consumed wholly within California. In fixing rates for Edison, the California Commission makes a comprehensive examination of Edison's records and determines from all available evidence the appropriate rate base, cost of service, and appropriate rate of return. After the Commission has computed the total revenue requirement, it performs the intricate task of determining the level of rates for each class of service.

This process requires a detailed knowledge and awareness of many local considerations, among which are: historical rate patterns, policy in favour of encouraging specific industries or the development of particular areas in the state, the question whether local public bodies like Colton should receive rate preference over other customers, variations in unit costs according to volume or time of usage, value of service, cost of service, and interrelation of electric energy with competing sources of energy. These are matters of peculiarly local concern which the FPC staff is ill-equipped and not as competent as the California Commission to handle.

In the process of determining total revenue requirements and prescribing the allocations thereof through rate-fixing among classes of service, it is obvious that the California Commission weaves a whole cloth. If the threads are disarranged the design of the tapestry is injured or destroyed accordingly. Certainly as a matter of policy the federal government should not be allowed to encroach in this area so overwhelmingly a matter of local concern unless there are compelling reasons. There are none. Since the Boulder Canyon Project legislation and the contracts thereunder authorize the United States to determine the exact allocation of energy between the states receiving Colorado River energy, and also fix the charges to Edison, and since such charges do not depend in any way upon either the amount of energy which Colton buys from Edison or the price paid therefor, there is no possible effect, direct or indirect, upon the rates of Arizona or Nevada electric users from the rate which the California Commission orders Edison to charge.

It follows that common sense, independently of legal arguments, leads one to conclude that there simply is no valid policy reason for FPC to claim the right to regulate rates for Edison's sales to Colton.

We may note in passing that FPC insists that it should have this jurisdiction over *all* wholesale sales, even if they are a matter of purely local concern, because there are a few states which have no regulatory commissions with power over wholesale sales. Brief, p. 41. This suggests an undue preoccupation by FPC with matters which should not be its concern. Where the wholesale sales in question *are* of purely local concern it should be for the states concerned, and not for FPC, to decide whether state regulation is necessary. In any event, in California there is no question that the California Public Utilities Commission has comprehensive regulatory control over such wholesale electric rates. Public Utilities Code, Sections 216(a), 218, 451-457.

We commend to the Court's attention the excellent reasoning of FPC Commissioners O'Connor and Woodward, dissenting in the recent *United Gas Pipeline* opinion No. 401 of the FPC (August 26, 1963, not yet reported). In deploring attempts of FPC to arrogate to itself a jurisdiction beyond that entrusted to it by Congress, the aforesaid dissenting commissioners, referring to the Natural Gas Act said:

> "But the majority contends that its regulatory powers would be more logical and complete if the Commission had jurisdiction over all wholesale sales (Mimeo p. 12). However, unlike the majority of this Commission, the Congress which enacted the Natural

> Gas Act was not striving to create a complete and comprehensive plan of federal regulation which readily pre-empted State regulatory authority in an urge for a consistent 'statutory scheme'. Instead, Congress made crystal clear its purpose was to set up a commission with limited jurisdiction created only to fill the regulatory gap and not to displace any constitutional State regulation. . . . It is difficult to understand the majority's willingness to cast aside these repeated and unanimous expressions of intent to preserve constitutional State regulation in favor of its own concept of logical regulatory power which is nowhere mentioned in the Act or reports or debates, . . . and which usurps State regulatory authority". (Mimeo, p. 8.)

The position of Commissioners O'Connor and Woodward as thus stated is strongly supported by the recent decision of the Fifth Circuit, *Lo Vaca Gathering Co. et al. v. Federal Power Commission*, Sept. 24, 1963 (as yet unreported) in which the FPC's assertion of jurisdiction was vacated. Said the court (folio, p. 11):

> "The courts are not competent to make legislative decisions as to whether jurisdiction *should* be given to the Commission under varying circumstances; the scope of our function is to determine whether such jurisdiction *does* attach, as the statute is written. . . . Our duty of statutory construction is limited to construing statutes, not constructing them."[10]

We respectfully submit, in conclusion, that the Ninth Circuit correctly determined that Part II of the Federal

[10]See Hooker, *The End of Local Regulation—An FPC Goal?*, Annual Report, Public Utility Law, American Bar Association, 1963.

Power Act precludes jurisdiction by FPC over Edison's sales to Colton.

There is an alternative and independent reason why FPC jurisdiction is precluded in this case. The terms of the Boulder Canyon Project legislation specifically lodge jurisdiction in the state commission to the exclusion of FPC. This issue, raised by Colton, will be considered next.

II. THE BOULDER CANYON PROJECT LEGISLATION PRECLUDES FPC JURISDICTION OVER EDISON'S SALES TO COLTON.

The sale by Edison to Colton is a sale of energy whose interstate component, if any, is generated by the United States and sold to Edison for resale in California pursuant to the Boulder Canyon Project legislation. Edison is the only company having a contract with the United States for Hoover energy and thereafter selling such energy for use within a single state.

The Boulder Canyon Project legislation does two things. First, it provides the basis for federal jurisdiction over the sale *to* Edison of Edison's only out-of-state source of energy. Second, it precludes FPC jurisdiction over any subsequent sales of such energy *by* Edison.

The Boulder Canyon Project Act (45 Stat. 1057, 43 U.S.C. 617) which was enacted in 1928 provides, in Section 6:

> ". . . *The Secretary of the Interior* shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting . . . maintenance of

a system of accounting, control of rates and service *in the absence of State regulation* or interstate agreement. . . . He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power Commission, which have been devised *or which may be hereafter devised*, for the protection of the investor and consumer . . . ." 43 U.S.C. 617e. (Emphasis added.)

When Congress enacted this legislation, it had determined to make the Boulder Project, now the Hoover Project, self-liquidating. The only substantial load centers at that time where the Hoover energy could be absorbed within a reasonable period were the region in and around the metropolitan areas of the City of Los Angeles served by Edison and certain municipal systems and the Metropolitan Water District of Southern California. It was the firm energy contracts executed pursuant to this legislation by Edison and the City of Los Angeles in 1930 and their agreement to purchase energy unused by other allottees which provided a sound financial basis for the Hoover Project. Under the Hoover contracts the United States is assured that it will receive an allocated share of the total cost of operating the Project from each allottee regardless of how much or how little energy the allottees or any of them can use.

It is clear that the Boulder Canyon Project Act and the Edison contract drawn thereunder were based upon the understanding that the power was to be sold by the United States for transmission into California and for sale thereafter by Edison within the State of California. Section 6, cited above, made it clear that all charges for

such energy sold in the State of California by Edison were to be regulated by California since California did have a Public Utilities Commission with regulatory power.

It should be remembered that the Federal Power Commission was in existence at the time Congress enacted the Boulder Canyon Project Act in 1928. FPC tried hard to persuade Congress to give FPC rate-making authority under such Act. Instead Congress granted such authority, so far as Hoover energy was concerned, to the Secretary of the Interior, or in the alternative to the State commission.

The intention of Congress to withhold jurisdiction from the FPC is made abundantly clear by the legislative history. See H.R. Rep. No. 1657, 69th Cong., 2d Sess. (1926), which demonstrates that FPC repeatedly sought to obtain authority to regulate the rates charged by Hoover allottees. Congress nevertheless granted such authority to the Secretary of the Interior, or in the alternative the State commission, and not to FPC. An unsuccessful attempt by an administrative body to secure an express grant by Congress is significant in determining whether the power so requested was conferred by the statute. *Federal Trade Commission v. Bunte Bros., Inc.*, 312 U.S. 349, 351-352 (1941).

The Secretary is directed under Section 6 to conform with the Federal Water Power Act and with the rules and regulations of the Federal Power Commission then or thereafter devised for the protection of the investor and consumer. Clearly, Part II of the Federal Power Act, enacted in 1935, was "thereafter devised". It is clear that Congress intended the Secretary's authority (in the ab-

sence of state regulation) to be exclusive in such matters, otherwise such direction would have been superfluous.

We submit that the statutory history as well as the plain words of Section 6 conclusively prove that the regulatory authority granted to the Secretary (or alternatively to a state commission if the state have one) as to the Hoover project is that which the FPC asked for but was denied.

Colton now argues that the regulatory provisions in Section 6 were repealed by implication in 1935 by the enactment of Part II of the Federal Power Act. This argument of repeal by implication is proven to be invalid when consideration is given to Congressional events subsequent to 1935. The Boulder Canyon Project Adjustment Act of 1940, 43 U.S.C. 618 *et seq.*, enacted five years after Part II of the Federal Power Act, not only did not repeal the Boulder Canyon Project Act, but specifically amended portions of Section 6, *leaving intact* that portion authorizing regulation of the rates charged for the resale of Hoover energy. The intent of Congress to preserve Section 6 is further indicated by the fact that the Boulder Canyon Project Act is retained in the United States Code. 43 USC 617. Furthermore, there is evidence that the FPC itself has recognized the continued integrity of Section 6 for it has consistently included that section among the extracts from the Boulder Canyon Project Act which appear in FPC's own pamphlet compiling the laws respecting the limits of its authority. "Federal Power Act" (GPO 1963), at pp. 59-65.

In 1954, the subject of the consolidation of the operation of the Colorado River projects was before Congress,

and again Congress reaffirmed the validity and current effectiveness of the Boulder Canyon Project Act:

> ". . . nothing contained in this Act shall be construed to alter or affect in any way the Boulder Canyon Project Act (45 Stat. 1057), the Boulder Canyon Project Adjustment Act (54 Stat. 774), . . ." Act of May 28, 1954, 68 Stat. 43.

Congress has had several opportunities to amend or modify the method of regulation of rates prescribed in Section 6 of the Boulder Canyon Project Act. It has not done so, and on the contrary *has specifically reaffirmed that Act in its entirety.* This is particularly striking in view of the fact that Congress has from time to time expressly empowered the Federal Power Commission to regulate rates, or to approve rates, in connection with other federal projects. See Bonneville Project Act, Section 5, 50 Stat. 734, 16 USC 832d (1937); Flood Control Act of 1938, Section 4, 52 Stat. 1216; Flood Control Act of 1939, Section 6, 53 Stat. 1414; Flood Control Act of 1944, Section 5, 58 Stat. 890, 16 USC 825s; Eklutna Project Act, Section 1, 64 Stat. 382, 48 USC 312a (1950).

The Boulder Canyon Project Act is unique and specific legislation directed at the comprehensive treatment of one particular problem: the construction and operation of Hoover Dam and Power Plant. Congress obviously regarded the magnitude and the complexity of the Project deserving of special legislation, not to be disturbed by later legislation enlarging some of the authority of FPC. Part II, it must be remembered, was an *amendment* to the Federal Water Power Act, an act general in nature even after being amended by said Part II. See Section 213 of

the 1935 Act, 49 Stats. 854-862, which modified and expanded the procedural and administrative sections of the 1920 Act and which changed the name of the substantive portions of the 1920 Act to "Federal Power Act, Part I". See also, S. Rep. 621, 74th Cong., 1st Sess. 17 (1935). Indeed, such legislation increases the authority of the Secretary of the Interior by broadening the standards of investor and consumer protection which the Secretary is directed to enforce pursuant to Section 6 of the Boulder Canyon Project Act.

United States v. Public Utilities Commission, 345 US 295 (1953), cited by Colton, is certainly not controlling or persuasive with respect to the effect of Part II of the Federal Power Act upon the Boulder Canyon Project Act. In that case the question was whether the provisions of Part II relating to FPC rate jurisdiction superseded the provisions of Part I enacted in 1920 relating to the same subject. The Court concluded that Part II superseded the earlier (and then inconsistent) provisions of the Act being amended.

It is important to note that the sale for resale in the *Public Utilities Commission* case was an "Attleboro Gap" sale, where the State of California had attempted to fix rates for energy to be consumed in the State of Nevada. This is comparable to the sale by the United States of Hoover energy to Edison. In the present case the energy subsequently sold by Edison to Colton is consumed entirely within the City of Colton or its environs. All energy sold by Edison to any of its customers is generated in California except for the small amount purchased by Edison under contracts with the United States. Pursuant

to the Boulder Canyon Project legislation, the Hoover power contracts fix the price for the only out-of-state energy available to Edison and assure the United States that it will receive the cost of operating the project. These facts preclude the possibility of California's regulation of the rates to be charged by Edison to Colton from having any actual or potential adverse effect upon any other state or the United States.

The Boulder Canyon Project Act was enacted in 1928, the year following the *Attleboro* case when Congress was aware that the states could not, *at least in the absence of congressional permission*, regulate certain sales for resale, and therefore it can reasonably be said that Congress has given to the states whatever permission was necessary so to regulate.

Section 6 of the Boulder Canyon Project Act is a full and sufficient exercise of Congress' undoubted power to permit state regulation of transactions where local interest predominates or interstate commerce cannot be burdened. Compare the Webb-Kenyon Act, 37 Stat. 699, 27 USC 122 (1913); the Hawes-Cooper Act, 45 Stat. 1084, 49 USC 60 (1929); the Hinshaw Amendment to the Natural Gas Act, 68 Stat. 36, 15 USC 717 (c) (1934).

The Boulder Canyon Project situation is unique and complex. The history of the Hoover Project fully demonstrates that the national interest is fully protected by the several contracts executed by the United States and Edison and that the subsequent transmission, distribution and sale of such electric energy in the State of California are matters of local concern to be accomplished without regulation or re-regulation by the Federal Power Commission.

CONCLUSION

For the reasons set forth herein, we respectfully submit that the decision below, setting aside the order of the Federal Power Commission, should be affirmed.

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October 18, 1963

(Appendix Follows)

Appendix

The Federal Power Act, Part II, 49 Stat. 847 (1935), 16 U.S.C. 824-824h, provides in part as follows:

DECLARATION OF POLICY; APPLICATION OF PART; DEFINITIONS

SEC. 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for

the transmission of electric energy consumed wholly by the transmitter.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in this Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part.

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a State, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, or employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto. [49 Stat. 847; 16 U.S.C. 824]

INTERCONNECTION AND COORDINATION OF FACILITIES; EMERGENCIES; TRANSMISSION TO FOREIGN COUNTRIES

SEC. 202. [*As amended August 7, 1953.*] (a) For the purpose of assuring an abundant supply of electric energy throughout the United States with the greatest possible

economy and with regard to the proper utilization and conservation of natural resources, the Commission is empowered and directed to divide the country into regional districts for the voluntary interconnection and coordination of facilities for the generation, transmission, and sale of electric energy, and it may at any time thereafter, upon its own motion or upon application, make such modifications thereof as in its judgment will promote the public interest. Each such district shall embrace an area which, in the judgment of the Commission, can economically be served by such interconnected and coordinated electric facilities. It shall be the duty of the Commission to promote and encourage such interconnection and coordination within each such district and between such districts. Before establishing any such district and fixing or modifying the boundaries thereof the Commission shall give notice to the State commission of each State situated wholly or in part within such district, and shall afford each such State commission reasonable opportunity to present its views and recommendations, and shall receive and consider such views and recommendations.

(b) Whenever the Commission, upon application of any State commission or of any person engaged in the transmission or sale of electric energy, and after notice to each State commission and public utility affected and after opportunity for hearing, finds such action necessary or appropriate in the public interest it may by order direct a public utility (if the Commission finds that no undue burden will be placed upon such public utility thereby) to establish physical connection of its transmission facilities with the facilities of one or more other persons engaged

in the transmission or sale of electric energy, to sell energy to or exchange energy with such persons: *Provided*, That the Commission shall have no authority to compel the enlargement of generating facilities for such purposes, nor to compel such public utility to sell or exchange energy when to do so would impair its ability to render adequate service to its customers. The Commission may prescribe the terms and conditions of the arrangement to be made between the persons affected by any such order, including the apportionment of cost between them and the compensation or reimbursement reasonably due to any of them. [49 Stat. 848; 67 Stat. 461; 16 U.S.C. 824a]

* * *

RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

SEC. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful. [49 Stat. 851; 16 U.S.C. 824d]

* * *

FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

SEC. 206. (a) Whenever the Commission, after a hearing had upon its own motion or upon complaint, shall find that any rate, charge, or classification, demanded, observed, charged, or collected by any public utility for any

transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be thereafter observed and in force, and shall fix the same by order. [49 Stat. 852; 16 U.S.C. 824e]

* * *

ASCERTAINMENT OF COST OF PROPERTY

SEC. 208. (a) The Commission may investigate and ascertain the actual legitimate cost of the property of every public utility, the depreciation therein, and, when found necessary for rate-making purposes, other facts which bear on the determination of such cost or depreciation, and the fair value of such property.

(b) Every public utility upon request shall file with the Commission an inventory of all or any part of its property and a statement of the original cost thereof, and shall keep the Commission informed regarding the cost of all additions, betterments, extensions, and new construction. [49 Stat. 853; 16 U.S.C. 824g]

The Natural Gas Act, 52 Stat. 821 (1938), 15 U.S.C. 717, et seq., provides in part as follows:

NECESSITY FOR REGULATION OF NATURAL GAS COMPANIES

SEC. 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby

declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest. [52 Stat. 821. (1938); 15 U.S.C. 717 (a)]

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas. [52 Stat. 821 (1938); 16 U.S.C. 717 (b)]

(c)[1] The provisions of this Act shall not apply to any person engaged in or legally authorized to engage in the transportation in interstate commerce or the sale in interstate commerce for resale, of natural gas received by such person from another person within or at the boundary of a State if all the natural gas so received is ultimately consumed within such State, or to any facilities used by such person for such transportation or sale, provided that the rates and service of such person and facilities be subject to regulation by a State commission. The matters

[1]Subsection (c) was added March 27, 1954, by Public Law No. 323, 83d Congress, chapter 115, 2d session (H. R. 5976) 68 Stat. 36.

exempted from the provisions of this Act by this subsection are hereby declared to be matters primarily of local concern and subject to regulation by the several States. A certification from such State commission to the Federal Power Commission that such State commission has regulatory jurisdiction over rates and service of such person and facilities and is exercising such jurisdiction shall constitute conclusive evidence of such regulatory power or jurisdiction. [68 Stat. 36 (1954); 15 U. S. C. 717 (c)]

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EXTENSION OF FACILITIES; ABANDONMENT OF SERVICE

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SEC. 7. (c) No natural-gas company or person which will be a natural-gas company upon completion of any proposed construction or extension shall engage in the transportation or sale of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the Commission authorizing such acts or operations: *Provided, however*, That if any such natural-gas company or predecessor in interest was bona fide engaged in transportation or sale of natural gas, subject to the jurisdiction of the Commission, on the effective date of this amendatory Act, over the route or routes or within the area for which application is made and has so operated since that time, the Commission shall issue such certificate without requiring further proof that public conveni-

ence and necessity will be served by such operation, and without further proceedings; if application for such certificate is made to the Commission within ninety days after the effective date of this amendatory Act. Pending the determination of any such application, the continuance of such operation shall be lawful.

In all other cases the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission; and the application shall be decided in accordance with the procedure provided in subsection (e) of this section and such certificate shall be issued or denied accordingly: *Provided, however,* That the Commission may issue a temporary certificate in cases of emergency, to assure maintenance of adequate service or to serve particular customers, without notice or hearing, pending the determination of an application for a certificate, and may by regulation exempt from the requirements of this section temporary acts or operations for which the issuance of a certificate will not be required in the public interest. [52 Stat. 825 (1938), as amended, 56 Stat. 83 (1942); 15 U.S.C. 717f (c)][1]

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[1]As originally enacted Section 7 (c) read as follows:

"(c) No natural-gas company shall undertake the construction or extension of any facilities for the transportation of natural gas to a market in which natural gas is already being served by another natural-gas company, or acquire or operate any such facilities or extensions thereof, or engage in transportation by means of any new or additional facilities, or sell natural gas in any such market, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require such new con-

The Boulder Canyon Project Act, Section 6, 45 Stat. 1061 (1928), 43 U.S.C. 617e, provides in part as follows:

SEC. 6. * * * The Secretary of the Interior shall prescribe and enforce rules and regulations conforming with the requirements of the Federal Water Power Act, so far as applicable, respecting maintenance of works in condition of repair adequate for their efficient operation, maintenance of a system of accounting, control of rates and service in the absence of State regulation or interstate agreement, valuation for rate-making purposes, transfers of contracts, contracts extending beyond the lease period, expropriation of excessive profits, recapture and/or emergency use by the United States of property of lessees, and penalties for enforcing regulations made under this Act or penalizing failure to comply with such regulations or with the provisions of this Act. He shall also conform with other provisions of the Federal Water Power Act and of the rules and regulations of the Federal Power

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struction or operation of any such facilities or extensions thereof: *Provided, however,* That a natural-gas company already serving a market may enlarge or extend its facilities for the purpose of supplying increased market demands in the territory in which it operates. Whenever any natural-gas company shall make application for a certificate of convenience and necessity under the provisions of this subsection, the Commission shall set the matter for hearing and shall give such reasonable notice of the hearing thereon to all interested persons as in its judgment may be necessary under rules and regulations to be prescribed by the Commission. In passing on applications for certificates of convenience and necessity, the Commission shall give due consideration to the applicant's ability to render and maintain adequate service at rates lower than those prevailing in the territory to be served, it being the intention of Congress that natural gas shall be sold in interstate commerce for resale for ultimate public consumption for domestic, commercial, industrial, or any other use at the lowest possible reasonable rate consistent with the maintenance of adequate service in the public interest." (52 Stat. 825 (1938))

Commission, which have been devised or which may be hereafter devised, for the protection of the investor and consumer.

* * *

The act of May 28, 1954, 68 Stat. 43, provides as follows:

For the purposes of effecting economies and increased efficiency in the construction, operation, and maintenance thereof and of accounting for the return of reimbursable costs, the Secretary of the Interior is authorized and directed to consolidate and administer as a single project to be known as the Parker-Davis project, Arizona-California-Nevada, the projects known as the Parker Dam power project, Arizona-California, and the Davis Dam project, Arizona-Nevada: *Provided*, That nothing in this Act shall be construed to alter or affect in any way the Boulder Canyon Project Act (45 Stat. 1057), the Boulder Canyon Project Adjustment Act (54 Stat. 774), or the treaty between the United States of America and the United Mexican States, signed at Washington on February 3, 1944, relating to the utilization of the waters of the Colorado and Tijuana Rivers and of the Rio Grande from Fort Quitman, Texas, to the Gulf of Mexico: *Provided further*, That nothing in this Act shall be construed to alter or affect in any way any right or obligation of the United States or any other party under contracts heretofore entered into by the United States.

SEC. 2. Funds heretofore appropriated for the Parker Dam power project, Arizona-California, and the Davis Dam project, Arizona-Nevada, shall be consolidated and shall be and remain available for the purposes for which they were appropriated.